

**United States Department of Labor
Employees' Compensation Appeals Board**

B.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Columbus, OH, Employer**

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**Docket No. 09-59
Issued: October 13, 2009**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 9, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 16, 2008, finding she was not entitled to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has a ratable permanent impairment to a scheduled member or function of the body under 5 U.S.C. § 8107 causally related to her employment injuries.

FACTUAL HISTORY

The case has been before the Board on prior appeals. In a decision dated February 27, 2003, the Board affirmed a July 23, 2002 Office decision denying compensation for wage loss for intermittent periods July 5, 1997 to March 5, 2001.¹ By decision dated December 3, 2007,

¹ Docket No. 02-2231 (issued February 27, 2003).

the Board set aside a May 3, 2007 Office decision and remanded the case for a merit decision on the schedule award issue.² The history of the case as provided in the Board's prior decisions is incorporated herein by reference.

With respect to the schedule award issue, appellant had submitted an October 20, 2003 report from Dr. Charles Kistler, a Board-certified osteopath, opining that she had permanent impairment to her arms and legs under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). A physician selected as a second opinion examiner, Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, submitted a January 22, 2004 report, noting no objective findings to show the accepted conditions of cervical, thoracic, lumbar strains and fibromyalgia were still active. He opined that appellant had no permanent impairment under the A.M.A., *Guides*.

The Office found a conflict existed in the medical evidence with respect to permanent impairment and continuing employment-related disability. The case was referred to Dr. Thomas Bender, a Board-certified orthopedic surgeon, as a referee physician. In a report dated August 13, 2004, he provided a history and results on examination. Dr. Bender stated:

“It is my understanding [appellant] has a claim number xxxxxx497 with a date of injury on July 13, 1996. The claim recognizes the condition of ‘cervical, thoracic, and lumbar strains and fibromyalgia. [Appellant] remains clinically symptomatic at this time from degenerative lumbar disc disease as well as what appears to be a heightened perception of personal dysfunction and pain. She does not have elements of cervical, thoracic or lumbar strain. [Appellant] does not have the classic elements of fibromyalgia. She does not have a trigger area or nodularities in the typical 18 areas as described by the American College of Rheumatology. On an objective basis, the conventional x-rays and MRI [magnetic resonance imaging] scan verify that [appellant] has diffuse degenerative disc disease and spondylosis and the axial skeleton. In terms of the conditions allowed in the claim including cervical, thoracic and lumbar strains, as well as the fibromyalgia, she does not have objective physical findings of ongoing disease entities or dysfunction. My utilization of the A[.]M[.]A[.], *Guides* would not provide the patient any impairment. [Appellant] is considered at maximum medical improvement nine months after the date of injury or the time of April 1, 1997. This would have allowed the soft tissue elements of the axial spinal strains to have resolved.”

Dr. Bender concluded that the degenerative disc disease was related to the aging process, independent of the employment injuries.

Based on Dr. Bender's report, the Office terminated compensation in a May 2, 2005 decision. It also found that appellant was not entitled to a schedule award under 5 U.S.C. § 8107.

² Docket No. 07-1545 (issued December 3, 2007).

Appellant submitted medical evidence from Dr. James Rutherford, a Board-certified orthopedic surgeon. In a report dated January 7, 2005,³ Dr. Rutherford opined that she had ongoing symptoms in her back and multiple areas associated with fibromyalgia related to her claim. In a June 30, 2005 report, he stated that not all soft tissue injuries resolve in 10 weeks and fibromyalgia was a chronic condition. Dr. Rutherford stated that Dr. Bender did not recognize that appellant was on restricted work until her retirement on July 23, 2002 and she continued to have the same restrictions. He stated that, while some of the ongoing symptoms could be attributed to degenerative disc disease, appellant did have continuing symptoms related to the employment injuries.

In a report dated January 17, 2005, Dr. Maria Haller, an osteopath, opined that appellant continued to have fibromyalgia. By report dated September 6, 2005, Dr. Kistler indicated that appellant continued to need treatment for fibromyalgia.

In a report dated June 6, 2006, Dr. Rutherford opined that appellant had six percent right upper extremity impairment, based on loss of range of motion for right shoulder flexion and abduction. He opined that the impairment was a consequence of cervical strain as well as fibromyalgia.

By decision dated March 3, 2008, the Office found that the medical evidence did not establish a permanent impairment to a scheduled member of the body causally related to the employment injuries. Appellant requested an oral hearing before an Office hearing representative, which was held on July 8, 2008. In a decision dated September 16, 2008, the hearing representative affirmed the March 3, 2008 decision. He found that the weight of the evidence was represented by Dr. Bender.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁴ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵ The permanent impairment must be causally related to an accepted employment injury.⁶

³ The first page of the report is dated January 7, 2004, but subsequent pages are dated January 7, 2005. Since Dr. Rutherford discusses Dr. Bender's August 2004 report, it is presumed the date of the report is January 7, 2005.

⁴ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid, additional members of the body are found at 20 C.F.R. § 10.404(a).

⁵ A. George Lampo, 45 ECAB 441 (1994).

⁶ Rosa Whitfield Swain, 38 ECAB 368 (1987).

A rationalized medical report is a report based on a complete factual and medical background with an opinion supported by medical rationale.⁷ It is well established that when a case is referred to a referee examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁸

ANALYSIS

In this case there was a conflict in the medical evidence with respect to a permanent impairment causally related to the accepted employment injuries. Dr. Kistler found an employment-related permanent impairment to both the arms and the legs, while the second opinion physician, Dr. Fisher, found no permanent impairment causally related to employment. Pursuant to 5 U.S.C. § 8123(a), appellant was referred to a referee physician to resolve the conflict.⁹

The referee physician, Dr. Bender, provided a rationalized medical opinion on the issue. He reviewed the medical evidence and explained that appellant did not have findings consistent with a continuing employment-related condition. Dr. Bender opined that appellant did not have a permanent impairment under the A.M.A., *Guides* causally related to an accepted employment-related condition. His rationalized medical report is entitled to special weight.

Dr. Rutherford opined that appellant had a six percent right arm impairment due to loss of right shoulder motion and that the impairment was causally related to employment.¹⁰ While he indicated that he disagreed with Dr. Bender, his report is not sufficient to overcome the special weight accorded to the referee physician. Dr. Rutherford opined that the impairment was related to both cervical strain and fibromyalgia, without adequately explaining why a right shoulder motion limitation was related to an employment injury. As he noted, appellant had symptoms that could be attributed to degenerative disc disease.

The weight of the medical evidence rests with Dr. Bender regarding a permanent impairment causally related to employment. He found no employment-related permanent impairment and the Office properly determined that appellant was not entitled to a schedule award.

⁷ See *Donald W. Wenzel*, 56 ECAB 390 (2005).

⁸ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

⁹ The Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a). The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

¹⁰ The hearing representative incorrectly found that Dr. Rutherford was on one side of the conflict resolved by Dr. Bender, the reports from Dr. Rutherford were not submitted until after Dr. Bender's August 13, 2004 report.

CONCLUSION

The Board finds that the conflict in the medical evidence was properly resolved and the weight of the evidence does not establish an employment-related permanent impairment entitling appellant to a schedule award under 5 U.S.C. § 8107.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 16 and March 3, 2008 are affirmed.

Issued: October 13, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board